STANDARD CHARTERED BANK (THEN KNOWN AS THE CHARTERED BANK) (NOMINEE TO LIM TONG SANG)

v.

DIRECTOR GENERAL OF INLAND REVENUE

HIGH COURT, PENANG
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[TAX APPEAL NO. 14-1-89]
19 AUGUST 1993

REVENUE LAW: Real Property Gains Tax Act, 1976 - Notice of Reduced Assessment - Section 14(1) - Notice did not refer to any tax reduction - Whether Notice valid - Whether issuance of Notice ultra vires - Fresh Notice of Assessment - Sections 15(1), (2) & 20(2)(b)(i) - Fresh Notice did not refer to additional assessment of tax - Whether issuance of fresh Notice ultra vires.

TAX APPEAL: Real Property Gains Tax Act, 1976 - Notice of Appeal against assessment - Notice in Form Q submitted - Respondent issued fresh Notice of Assessment - Appeal against fresh assessment not made - Appeal against earlier assessment struck out by Special Commissioners - Whether order for striking out bad in law - Sections 14(1), 15(1) & (2), 18(1), 20(2)(b)(i).

The appellant made a disposition of certain property (the said property) which was the subject matter of a Charge created in its favour by one Lim Tong Sang. On 19 January 1985 the appellant was served with a Notice of Assessment under the Real Property Gains Tax Act 1976 (the Act) whereby the appellant, named as nominee of Lim Tong Sang, was assessed to gains tax of RM32,012.70. On 22 January 1985 the appellant appealed against the assessment and submitted to the respondent a Notice of Appeal in Form Q.

On 22 May 1986 the respondent appointed the appellant as agent of Lim Tong Sang for the purpose of collection of tax. On 21 October 1987 the respondent issued a Notice of Reduction of Assessment to the appellant as nominee of Lim Tong Sang, whereby the tax payable by the appellant as per Notice of Assessment dated 19 January 1985 was discharged. On the same date the respondent issued a fresh Notice of Assessment whereby the appellant as agent of Lim Tong Sang, was assessed to tax of RM32,012.70 on the disposal of the said property. Against this fresh Notice of Assessment no appeal was lodged by the appellant.

Pursuant to s.18(1) of the Act, the respondent referred the appellant's appeal to the Special Commissioners of Income Tax, wherefore the appeal was struck out on the grounds, *inter alia*, that the appellant had failed to appeal against the fresh Notice of Assessment dated 21 October 1987 and therefore the assessment stated therein became final and conclusive against the appellant. Having ruled thus, the Special Commissioners stated a case to the High Court under para 34, 5th Schedule, Income Tax Act 1967, and sought the opinion of the Court on the propriety of its decision aforesaid.

The issues before the Court were:

1. Whether the issue of the Notice of Reduced Assessment dated 21 October 1987 was ultra vires the power of the respondent and therefore void and of no effect, and
2. If so, whether the issue of the fresh Notice of Assessment of 21 October 1987 was likewise ultra vires and therefore void and of no effect.

Held:

[1] The appellant was merely a registered chargee which had, pursuant to the powers conferred upon it by the National Land Code, enforced the Charge by way of an Order for Sale made by a Court of competent jurisdiction. In no way could the appellant therefore be described as an agent for the chargor Lim Tong Sang. Its appropriate designation for purposes of assessment to tax under the Act was that of nominee to the said chargor.

[2] It was ultra vires the powers conferred upon the respondent by the Real Property Gains Tax Act 1976 to issue the Notice of Reduced Assessment dated 21 October 1987, and, consequently, ultra vires its powers to further issue the fresh Notice of Assessment of the same date.

[3] The powers conferred upon the respondent to issue a Notice of Reduced Assessment are to be found in s. 14(1)(b) and (c) of the Act and that power did not reside in the respondent to issue the Notice of Reduced Assessment dated 21 October 1987 for the simple reason that there was no question here of any reduction of tax.

[4] So far as the powers of the respondent to raise subsequent assessments are concerned, these are to be found in ss. 15(1) and (2) or 20(2)(b)(i) of the Act.The power did not reside in the respondent to issue the 1987 Notice of

Assessment for the simple reason that there was no question here of an additional assessment being made for purposes of increasing the assessment.

[5] The Notice of Appeal in Form Q dated 22 January 1985 is valid and effective in law. Accordingly the appeal before the Special Commissioners is competent and the order striking the appeal out is therefore set aside.

[Case remitted to Special Commissioners for rehearing of appeal on merits].

Case referred to:
Jesabena Sdn. Bhd. v. Beh Heng Poo & Anor. [1985] 1 MLJ 394 ***(refd)***

Legislation referred to:
Income Tax Act 1967, paras 34, 37(a), 39 of the 5th Schedule
National Land Code
Real Property Gains Tax 1976, ss. 7(4)(a), 14(1)(b) & (c), 15(1) or (2), 17(1)(d) of Part III, 18, 20(1), (2)(b)(i), 51(1), (3)

For the appellant - N.G. Sivanandan; M/s. Presgrave & Matthews
For the respondent - Mohamed Bazain bin Idris; SFC

JUDGMENT

Edgar Joseph Jr. SCJ:
This was a case stated by the Special Commissioners of Income Tax ("the Special Commissioners") for the opinion of this Court, pursuant to para 34 of the 5th Schedule of the Income Tax Act 1967, which arose from a successful preliminary objection taken at the hearing before them, on behalf of the Director General of Inland Revenue ("the Revenue") who is the respondent to the present appeal.

Broadly stated, the preliminary objection taken by the Revenue was that the notice of appeal in Form Q dated 22 January 1985, which had been served upon the Special Commissioners having been followed by a fresh notice of assessment dated 21 November 1987, and the appellant Bank having failed to appeal against the fresh assessment appearing in the fresh notice of assessment dated 21 November 1987, there was in law no appeal before the Court, with the consequence that the notice of appeal dated 22 January 1985, would have to be struck out.

To put the preliminary objection in its correct perspective, it is necessary to set out the background facts and the rival contentions of the parties as they appear in the case stated; they are as follows:

1. At a meeting of the Special Commissioners of Income Tax on 18 April 1989 at Penang, the appellant's appeal against the notice of assessment dated 19 January 1985 showing RM32,012.70 tax payable for the year of assessment 1977 in respect of chargeable gains on disposal of chargeable assets was set down for hearing before us.

2. The following documents were submitted for the hearing:

Exhibit No.	Particulars
A1	Statement of agreed facts.
A2	Agreed bundle of documents (pages 1 - 102).

3. Encik N.G. Sivanandan assisted by Encik Ranjit Singh, both advocates and solicitors, appeared for the appellant. Cik Patricia Tan Ghee Phaik, Federal Counsel, assisted by Cik Lim Poa Chen, assessment officer, appeared for Revenue.
4. Before the appeal proceeded Federal Counsel on behalf of the Director General of Inland Revenue (Revenue) made a preliminary objection to the hearing of the appeal referred to in paragraph 1 above. After hearing and considering submissions made on behalf of both parties we immediately made an order striking out the said appeal: a copy of our formal Order is appended as Annexure "A".
5. The appellant was dissatisfied with our Order and requested us to state a case for the opinion of the High Court pursuant to paragraph 34 of Schedule 5 to the Income Tax Act 1967 in a letter dated 4 May 1989.

6. The salient facts (found or admitted) on which our Order was based, were as follows:

(a) one Lim Tong Sang was the registered owner of 8 holdings in the Central District of Province Wellesley (hereinafter referred to as "the subject properties");
(b) the subject properties were charged to Standard Chartered Bank, then known as The Chartered Bank (hereinafter referred to as "the Appellant") by the said Lim Tong Sang as security for banking facilities granted by the appellant to Lim Song Wood Moulding Sdn. Bhd.;
(c) the appellant was at all material times the nominee of Lim Tong Sang until it was declared the agent of Lim Tong Sang on 22 May 1986;
(d) by a sale and purchase agreement dated 30 May 1977 the appellant as nominee of Lim Tong Sang disposed the subject

properties to Jurutema Sdn. Bhd. for the sum of RM725,000;

(e) (1) by a notification of disposal of Chargeable Asset dated 14 October 1977 the appellant reported the disposal of the subject properties to the Director General of Inland Revenue (Revenue);

(2) Revenue issued a requisition dated 1 October 1980 requesting the appellant as nominee for Lim Song Wood Moulding Sdn. Bhd. to pay real property gains tax amounting to RM32,012.70 in respect of chargeable gains arising on the disposal of the subject properties;

(f) on 24 October 1980 the appellant paid the said tax under protest and at the same time sent a notice of appeal in Form Q dated 23 October 1980 appealing against the requisition dated 1 October 1980;

(g) (1) on 12 January 1981 the appellant made a return of disposal of chargeable assets for the year of assessment 1977 on Form CKHT 9 as chargee and nominee for Lim Tong Sang;

(2) Notice of assessment for the year of assessment 1977 dated 11 July 1981 in respect of the said properties was served on the appellant as nominee for Lim Song Wood Moulding Sdn. Bhd.;

(3) on 23 July 1981 the appellant through its solicitors sent a notice of appeal in Form Q to Revenue in respect of the notice of assessment referred to in subparagraph (2) above;

(h) (1) on 4 August 1984 Revenue issued a notice of reduction of assessment to the appellant as nominee for Lim Song Wood Moulding Sdn. Bhd. discharging the tax payable as per notice of assessment dated 11 July 1981 referred to in paragraph (g) (2) above;

(2) on the same date, that is, 4 August 1984, Revenue issued another notice of assessment for the same year of assessment 1977 to the appellant as nominee for Lim Tong Sang showing the sum of RM32,012.70 being tax on chargeable gains on the disposal of the subject properties; this notice was not received by the appellant;

(i)(1) on 19 January 1985 Revenue issued another notice of assessment for the year of assessment 1977 to the appellant as nominee for Lim Tong Sang showing the sum of RM32,012.70 being tax on chargeable gains on the disposal of the subject properties;

(2) in its covering letter dated 19 January 1985 to the appellant enclosing therewith the said notice of assessment and Form Q., Revenue informed the appellant that the notice of assessment dated 4 August 1984 referred to in paragraph (h)(2) above was to be treated as cancelled;

(j) on 22 January 1985 the appellant filed an appeal in Form Q in respect of the notice of assessment dated 19 January 1985 referred to in paragraph (i)(1) above; (this appeal is the subject matter of the application by Revenue to have it struck out);

(k) on 5 February 1986 Revenue wrote to the appellant's solicitors and, *inter alia*, enquired whether the appellant wished to proceed with its appeal; to this the solicitors replied on the same date that their instructions were to proceed with the grounds of appeal as stipulated in the Form Q dated 22 January 1985;

(l) (1) by a letter dated 22 May 1986 Revenue declared the appellant as agent for Lim Tong Sang in respect of the tax payable vide notice of assessment dated 19 January 1985, pursuant to s. 51(1) of the Real Property Gains Tax Act 1976 (the RPGTA);

(2) by a letter dated 7 October 1987, revenue informed the solicitors for the appellant, *inter alia*, that 2 notices of assessment were issued, one dated 11 July 1981 to the appellant as nominee for Lim Song Wood Moulding Sdn. Bhd. and the other dated 19 January 1985 to the appellant as nominee for Lim Tong Sang, and that the former notice had been cancelled while the latter was the effective notice;

(m)(1) on 21 November 1987 Revenue issued a notice of reduction of assessment to the appellant as nominee for Lim Tong Sang discharging the tax payable by the appellant as per notice of assessment dated 19 January 1985 referred to in paragraph (i)(1);

(2) On the same date i.e. 21 November 1987 Revenue issued a notice of assessment to the appellant as **agent** for Lim Tong Sang showing the sum of RM32,012.70 being tax on chargeable gains on the disposal of the subject properties;

(n) on 9 July 1988 Revenue sent the appeal in Form Q dated 21 January 1985 to the Special Commissioners of Income Tax pursuant to s. 18(1) of the RPGTA;

(o) no appeal was lodged in respect of the notice of assessment referred to in paragraph (m)(2) above or in respect of the declaration that the appellant was the agent of Lim Tong Sang referred to in paragraph (1) above.

7. It was submitted by the appellant as follows:

(a) Federal Counsel for Revenue should have given notice of the preliminary objection, bearing in mind that she had signed the agreed statement of facts (A1) a day before the hearing, in particular paragraph 3;

(b) at all times Revenue had held out that the notice of assessment it was relying upon was the one dated 19 January 1985 and the subject matter of the appeal is the appellant's notice of appeal dated 22 January 1985; there was no word from Revenue that it was relying on the purported notice of assessment of 21 November 1987;

(c) Revenue now says that the appellant should have appealed against the notice of assessment dated 21 November 1987 which notice states that the appellant is agent for Lim Tong Sang;

(d)(1) the Form Q dated 22 January 1985 lodged by the appellant was the 3rd time the appellant filed notice of appeal in respect of the same subject matter and amount;

(2) by a letter dated 17 January 1986 the appellant's solicitors wrote to the revenue a 4th reminder requesting the date of hearing of the appeal before the Special Commissioners and in response the Revenue in its letter of 5 February 1986, in the ultimate paragraph requested whether the appellant was proceeding on all the grounds of appeal and by letter dated 15 February 1986 the appellant's solicitors confirmed that the appellant will be proceeding on all the grounds set out in Form Q dated 22 January 1985 and required the appeal to be referred immediately to the Special Commissioners owing to the fact that it was a long outstanding matter;

(e) by a letter dated 22 May 1986 (A2, page 95) Revenue appointed the appellant as agent in respect of the notice of assessment dated 19 January 1985; but by a letter dated 7 October 1987; (A2, page 97 (paragraph 3)) Revenue stated, *inter alia*, that the appellant is the nominee for Lim Tong Sang;

(f) by notices as per pages 98 and 99 of A2, Revenue discharged the notice of assessment dated 19 January 1985 and on the same date issued a fresh notice of assessment as agent; there was no Form Q enclosed as revenue usually did, to enable the appellant to appeal;

(g) the next thing the appellant received was a copy of the letter from Revenue to the Special Commissioners dated 9 July 1988, forwarding the Form Q dated 19 January 1985;

(h) in the light of the circumstances of this case based on conscience and equity Revenue is urged to disregard the notice of reduced assessment and the notice of assessment as per pages 98 and 99 of A2 and proceed with the appeal, failing which, the Special Commissioners to ignore them as Revenue had no right to issue the same.

8. It was submitted by Revenue as follows:

(a) the Form Q dated 22 January 1985 was forwarded to the Special Commissioners because the appellant wished to proceed with all the grounds of appeal as per the said Form Q and requested that the matter be referred to the Special Commissioners quickly (see A2, pages 92 - 94);

(b) since this Form Q is an appeal against the notice of assessment dated 19 January 1985 which had been superseded by the notice of assessment dated 21 November 1987 (see A2, page 99), the appeal before the Special Commissioners would be merely academic and a futile exercise;

(c) the notice of assessment dated 19 January 1985 had been discharged (to nil) on 21 November 1987 (see A2, page 98); consequently the said notice, for which the Form Q dated 22 January 1985 was lodged, is not an issue any more;

(d) there is no requirement to give notice of preliminary objection if the objection relates to law or jurisdiction and none is required under Schedule 5 to the ITA; in fact notice was given one day before the hearing to the solicitors for the appellant;

(e) as regards whether Revenue agrees to the appellant acting as nominee or agent for Lim Tong Sang, Revenue has not changed its stand; paragraph 3 of the agreed statement of facts (A1) made reference to "at all material times" and such material times referred to 22 January 1985 when Form Q was filed;

(f) the duty to appeal against the notice of assessment dated 21 November 1987 lies with the appellant; Revenue is not obliged

to assume that the appellant wants Form Q to appeal against it;

(g) as regards the complaint that there was no word from Revenue that it was relying on the notice of assessment dated 21 November 1987, Revenue submits that the said notice is in the agreed bundle of documents (A2) properly before the Special Commissioners and it can rely on it;

(h) there is no equity in tax law;

(i) Revenue prays for an order that the appeal be struck out.

In their reasons for upholding the preliminary objection the Special Commissioners said this:

> 9. In accordance with paragraph 37(a) of Schedule 5 to the Income Tax Act 1967, we hereunder state the grounds of our decision.
>
> *Reasons:*
>
> We have duly stated the salient facts of this appeal in paragraph 6 hereinbefore and as such we do not intent to repeat the same except to comment on paragraph 6(c). We made that finding of fact at paragraph 6(c) based on the agreed fact in A1, paragraph 3, the declaration of the appellant as agent for Lim Tong Sang on 22 May 1986 (see A2, page 95), the submission of Federal Counsel for Revenue on the said paragraph 3 of A1 (see paragraph 18(e)) and the issues in contention between the parties at the hearing of the application before us. In making the finding at paragraph 6(c) we also took into account Revenue's letter dated 7 October 1987 (A2, page 97) to the appellant's solicitors wherein it stated, *inter alia*, that the effective **notice of assessment** was that of the 19 January 1985 which was addressed to the appellant as nominee of Lim Tong Sang. That was a fact and the **position as at 7 October 1987.** We do not think that Revenue had to be bound by this statement of 7 October 1987 and could not alter the position as it did on 21 November 1987 when it issued a notice of reduction of assessment to the appellant as **nominee** of Lim Tong Sang and a fresh notice of assessment to the appellant as **agent** for Lim Tong Sang (see paragraph 6(m)). After all the appellant was already declared as agent for Lim Tong Sang and Revenue's letter dated 7 October 1987 to the appellant's solicitors did not state that the declaration of the appellant as agent of Lim Tong Sang had been revoked.
>
> After giving due consideration to the facts and submissions made by the parties we respectfully agree with the contention of Federal Counsel for Revenue that since the notice of assessment dated 19 January 1985 had been discharged, the said notice was no longer in issue and therefore the appeal in Form Q which related to the said notice would be merely academic and an exercise in futility: see paragraph 8(b) & (c) of Revenue's submission.
>
> Counsel for the appellant in his submission did not dispute that by the notice of reduced assessment dated 21 November 1987 Revenue had discharged the notice of assessment dated 19 January 1985, and a fresh notice of assessment also of the same date 21 November 1987 had been issued to the appellant as agent for Lim Tong Sang (see paragraph 7(f)). He however urged Revenue to disregard the above mentioned notice of reduced assessment and the fresh notice of assessment failing which, the Special Commissioners were urged to ignore them, so that what remained to be determined before us was the notice of assessment dated 19 January 1985 for the appeal of which the appellant had lodged Form Q dated 22 January 1985. He contended that Revenue had no right to issue the 2 notices dated 21 November 1987 (see paragraph 7(h)).
>
> The question is whether the fresh notice of assessment dated 21 November 1987 had superseded the notice of assessment dated 19 January 1985. We held that it had. The reason is that although the later (1987) notice was in respect of the tax on the same subject properties, the same amount of tax payable and for the same year of assessment as in the earlier (1985) notice, the taxpayer addressed to in the later (1987) notice was different. It was to the appellant as **agent** for Lim Tong Sang. In our view the designation as agent is totally different from that of nominee. Thus under s. 51(3) of the Real Property Gains Tax Act 1976 (the RPGTA) where a person declared under subsection (1) to be the agent of another person is aggrieved by the declaration, he may appeal under s. 18 as if the declaration were an assessment.
>
> In the instant case we found that there was no evidence or record that the appellant had appealed against the declaration as agent for Lim Tong Sang made by the Director General of Inland Revenue on 22 May 1986 pursuant to s. 51(1) or appealed against the notice of assessment dated 21 November 1987 addressed to it as **agent** for Lim Tong Sang. The failure, we held, was fatal to the appellant, for, by s. 20(1), an assessment shall become final and conclusive for all the purposes of the Act as regards the amount of the tax assessed under it on the expiry of the time for appeal against the assessment.
>
> An assessment against which an appeal may be preferred to the Special Commissioners of

Income Tax is an assessment duly made by the Director General of Inland Revenue pursuant to Part III of the RPGTA. We found nothing in the notice of assessment dated 21 November 1987 (A2, page 99) to indicate that the said notice was in any way defective or invalid: see s. 17 of Part III, RPGTA. One pertinent matter that is required to be brought to the attention of the taxpayer in a notice of assessment is the existence of the right of appeal conferred by s. 18 (see s. 17(1)(d); that this requirement had been complied with is clearly indicated in Note (c) entitled "Appeal Against Assessment" at the back page of the notice of assessment A2, page 99.

For the above reasons we struck out the appeal.

The question of law for the opinion of the High Court is whether, on the facts as stated, our unanimous decision was correct.

In this judgment, unless the context otherwise requires, I shall, for the sake of brevity and convenience, refer to the notice of assessment dated 19 January 1985 and the fresh notice of assessment dated 21 November 1987 as the "1985 notice of assessment" and the "1987 notice of assessment" respectively.

I do not propose to solemnly wade through the lengthy written submissions which were advanced on behalf of the parties before me. Instead, what I propose to do is to confine myself to two key issues, namely:

(1) Was the issue of the notice of reduced assessment dated 21 November 1987, *ultra vires* the powers of the Revenue and therefore void and of no effect ?
(2) If so, was the fresh notice of assessment dated 21 November 1987, *ultra vires* the powers of the Revenue, and therefore void and of no effect ?

Now, the powers conferred upon the Revenue to issue a notice of reduced assessment are to be found in s. 14(1)(b) and (c) of the Real Property Gains Tax 1976, ("the Act") which provide as follows:

Assessments

14. (1) Where a person makes a return under s. 13(1), the Director General may -
(a) ...; or
(b) ...; or
(c) reduce an assessment made for the year of assessment for which the return was made, in giving effect to s. 7(4)(a).

Section 7(4)(a) of the Act provides as follows:

Chargeable gains, allowable losses and tax relief for allowable losses.

7. (4) (a) Where there is an allowable loss in respect of a disposal, tax relief shall be allowed in respect of such allowable loss in an amount equal to the sum arrived at by applying to every ringgit of such allowable loss the appropriate rate of tax specified in Schedule 5 in respect of the category of disposal giving rise to that allowable loss as a deduction from the total tax assessed for the year of assessment in which the disposal was made.

And, so far as the powers of the Revenue to raise subsequent assessments are concerned, these are to be found in ss. 15(1) or (2) and 20(2)(b)(i) of the Act which provide as follows:

15. (1) The Director General, where in respect of any year of assessment it appears to him **that no or no sufficient assessment** has been **made on a person chargeable** with the tax, may within twelve years after the end of that year of assessment make on that person **whatever assessment** or additional assessment he considers to be appropriate.
(2) The Director General, where it appears to him that a person chargeable with the tax has been guilty of any form of fraud or wilful default in connection with or in relation to the tax, may at any time make an assessment in respect of that person for the purpose of making good any loss of the tax attributable to the fraud or wilful default.
(Emphasis provided).

20. (1) Subject to this section, an assessment shall become final and conclusive for all the purposes of this Act as regards the amount of the tax assessed under it or the tax relief for allowable losses indicated in it, as the case may be:

(a) on the expiry of the time for appeal against the assessment; or
(b) where an appeal is made, on the appeal being finally disposed of.

(2) Subsection (1) -

(a) shall not apply to an assessment made under s. 14(3) until it is adopted as the assessment for the year of assessment to which it relates;
(b) **shall not prevent** the Director General from making in respect of any year of assessment

(i) an assessment under **s. 15(1) or (2)**; or
(ii) a revision under s. 19(1).

(Emphasis provided).

The Revenue can therefore only raise subsequent assessments under s. 15(1) and (2) or under s. 20(2)(b)(i).

It was common ground between the parties, and so found by the Special Commissioners in their case stated, that the 1985 notice of assessment and the 1987 notice of assessment were in respect of the **same subject properties,** which were subject to a third party charge registered under the National Land Code 1965, and created by the chargor Lim Tong Sang in favour of the appellant bank as security for banking facilities provided by the appellant bank to Lim Song Wood Moulding Sdn. Bhd.

It was also common ground between the parties, and so found by the Special Commissioners in their case stated, that the two notices of assessments aforesaid were for the **same amount of tax** payable and for the **same year of assessment.**

The only point of difference between the two notices of assessment aforesaid, as the Special Commissioners themselves noted, was that in the earlier one the taxpayer named was the appellant bank with the designation "as nominee", **whereas** in the later one, the taxpayer named was the appellant bank with the designation "as agent".

With respect, I do not consider that there was substance in the preliminary objection. Having regard to the facts as agreed by the parties and found by the Special Commissioner in their case stated , I am of the view that power did not reside in the Revenue to issue the notice of reduced assessment dated 21 November 1987, for the simple reason that there was no question here of any **reduction** of tax.

Similarly, power did not reside in the Revenue to issue the 1987 notice of assessment for the simple reason that there was no question here of an **additional assessment** being made for purposes of increasing the assessment.

As for the different designations appearing in the two notices of assessment, I have no doubt that regard being had to the fact that the appellant bank was merely a registered chargee which had, by the National Land Code, pursuant to the powers conferred upon it, enforced the charge by way of an order for sale made by a Court of competent jurisdiction, pursuant to which there was a sale by private treaty of the subject properties, the appellant bank could in no way be described as an agent for the chargor Lim Tong Sang and that its appropriate designation for purposes of assessment to tax under the Act, (as indeed had been agreed to by Senior Federal Counsel in the agreed statement of facts being Ex A1) was that of nominee to the chargee Lim Tong Sang.

It follows, therefore, that having regard to the particular circumstances of this case, I must determine the two key issues herinbefore referred to in favour of the appellant bank by saying that it was *ultra vires* the powers conferred upon the Revenue by the Act, to issue the notice of reduced assessment dated 21 November 1987, and, consequently, *ultra vires* its powers to have issued the notice of assessment of 1987. Consequently, I do declare that the notice of appeal in Form Q, dated 22 January 1985, is valid and effective in law, that the appeal before the Special Commissioners is competent and so their order striking it out is set aside.

This is sufficient to dispose of the appeal before me and so anything I might say with regard to the various other arguments which were advanced by the appellant bank touching on the interesting questions of law, including points as to limitation and whether a chargee is chargeable person and therefore chargeable to tax pursuant to the provisions of the Act, would be by way of *obiter dicta* only and so I express no opinion on them.

Accordingly, pursuant to my powers under para 39 of the 5th Schedule of the Income Tax Act 1967, I remit the case, to the Special Commissioners with my opinion as aforesaid on the two key issues and a direction that the hearing before them on the merits must proceed with all convenient speed.

By way of postlude, I must observe that no notice in writing of intention to take the preliminary objection had been given to the appellant bank before the hearing. The importance of doing so had been emphasised by me in my judgment in

Jesabena Sdn. Bhd. v. Beh Heng Poo & Anor. [1985] 1 MLJ 394 at 396 F and G in the following terms:

> Before concluding, I have an observation to make, and it is this: Counsel for the respondents when he raised the preliminary objection herein, did so without any prior notice to his opponent. This was unfortunate and I would echo the practice advocated by Thomson CJ in *Gurbachan Singh v. Seagrott & Campbell* that when points such as this are proposed to be taken, notice in writing of an intention to do so should be given at the earliest possible moment to the other side who otherwise might be taken by surprise.

I would add that, in certain circumstances, failure to give notice as aforesaid, could amount to a waiver of an irregularity. It is otherwise where the point taken, if valid, results in a nullity, since a nullity is incapable in law of being waived.

I am now prepared to hear arguments as to costs.

STRAITS VIEW HOTEL SDN. BHD.

v.

TAN AH PENG & ANOR.

HIGH COURT, JOHORE BAHRU
DATO' V.C. GEORGE J.
[CIVIL SUIT NO. 22-103 OF 1992]
11 SEPTEMBER 1993

CONTRACT: Tenancy in hotel premises - Alleged representation by owners of hotel to give an extension to term of tenancy - Burden of proving the representation.

This was a claim by plaintiff (P) for vacant possession of a part of the Straits View Hotel which was rented out to the company Jaw Five Restaurant Sdn. Bhd. of which the 1st defendant Tan was the managing director. The plaintiff also claimed damages for holding over, interests and costs.

The dispute arose in relation to the period of tenancy pursuant to a tenancy agreement (the tenancy) entered into with Tan on 5 December 1985 which tenancy was later assigned to the 2nd defendant, a company incorporated by Tan. The tenancy was for a term of 3 years. However Condition 31 of the tenancy gave the tenant an option to renew the tenancy for a further period of 3 years by way of a written notice to P.

The defendants exercised the option when the first 3 years expired. Subsequently when 6 years was almost up, Tan wrote to P asking for a further term or extension of 3 years. The request was denied and eventually this suit was brought.

The defence turned upon an alleged oral representation by one Dato J.C. Chang whose parent company J.C. Chang (Pte) Ltd. owned the hotel. Tan alleged that a promise was given at the outset that a total term of 9 years tenancy was assured and upon the faith of this assertion Tan entered into the tenancy and expanded money in renovations. Tan apparently accepted Chang's explanation for excluding the extension in the tenancy on the grounds that the property had only 1 title and therefore such an inclusion was not allowed. He testified that a term of only 3 years with an option of another 3 would not have been a feasible project in his mind and would have been rejected by him.